S.B.Civil Revision Petition No.1206/2003

Ramniwas.
vs.
Jaichand Lal and others.

Date : 12.7.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. JK Bhaiya, for the petitioner.

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Heard learned counsel for the petitioner.

Brief facts of the case are that one lady plaintiff Smt. Krishna Devi filed a suit for possession against her husband's brother – petitioner as back as in the year 1973 on the grounds that she is owner of the suit property and she was residing with her husband at Jaipur in the year 1968, then the defendant encroached upon certain accommodation in the suit property in absence of the plaintiff and her husband.

The suit was contested by the defendant – petitioner. According to the defendant, the suit property was not the property of the plaintiff. It is submitted that in the year 1958-59, the properties of the father of the plaintiff's husband were partitioned between the plaintiff's husband and plaintiff's father and thereafter the properties were purchased in different names of the family members. According to the defendant, the house in dispute fell in

the share of the defendant and it was decided that the sale deed will be executed in favour of the defendant. The plaintiff and her husband denied to execute the sale deed for a long time and during this period, the defendant invested money over this property. The defendant also took the plea of the adverse possession.

Rejoinder was filed by the plaintiff stating therein that she purchased the house by three separate sale deeds dated 11.7.1959, 29.9.1959 and 24.9.1959. The plaintiff also rebutted all the allegation of the defendant.

Ultimately the suit was decreed by the trial court vide judgment and decree dated 4.10.1983 after about 10 years. The defendant- present petitioner preferred appeal against the said judgment and decree of the trial court dated 4.10.1983. In the first appellate court, an application was submitted by the defendant (appellant before the first appellate court and the petitioner before this Court) stating therein that the plaintiff agreed that whatever her husband will decide, that will be binding upon her and thereafter, an agreement of partition was executed between the plaintiff's husband – Dr. Mahaveer Prasad and petitioner Ram Niwas on 25.4.1989. In this agreement, it has been provided that how the properties shall be distributed between the plaintiff's husband and defendant Ramniwas and in this agreement in para no.4, it is also provided that till the plaintiff's husband will provide him house constructed over the land near Meeno Ka Kuhan, till then the petitioner will not vacate the suit property of plaintiff's suit. On 28.4.1989, an application was

submitted before the first appellate court and it was prayed that the plaintiff's appeal be dismissed as withdrawn in view of the compromise between the plaintiff and defendant.

The first appellate court in its order dated 28.4.1989 after narrating the facts as mentioned in the application filed by defendant/petitioner Ram Niwas recorded the statement of counsel for the defendant/appellant that in view of the compromise, the appellant does not want to proceed with the appeal, therefore, the appeal may be dismissed. For this dismissal, the plaintiff's counsel also gave his consent. In the order dated 28.4.1989 of dismissal of appeal as withdrawn, the first appellate court specifically upheld the judgment and decree of the trial court dated 4.10.1983.

It appears that for few years, nothing happened but on 21.5.1994, a notice was served by the plaintiff's husband upon defendant Ram Niwas – his brother which was replied by defendant on 21.6.1994 wherein there is a reference of the compromise and it has been stated by the defendant/judgment debtor that he has withdrawn the appeal because of the compromise, therefore, in view of the compromise, the defendant is not supposed to deliver the possession of the properties in pursuance of the decree dated 4.10.1983. It appears from the record that one suit also was filed by defendant Ram Niwas for getting decree of injunction against plaintiff's husband Dr. Mahaveer Prasad.

It appears from the facts of the case that plaintiff sold her property by registered sale deed in favour of the

present respondents who submitted execution petition before the trial court to execute the decree passed in Civil Original Suit No.18/1974 and decreed on 4.10.1983. The execution of the decree was opposed by the petitioner/ judgment debtor by raising objections that appeal against the petitioner-defendant's eviction in suit no.18/1974 was withdrawn because of compromise between the petitioner/defendant and the plaintiff through her husband. Therefore, the decree dated 4.10.1983 passed in civil original suit no.18/1974 is not executable and the defendant cannot be evicted by the plaintiff or her transferee.

Learned counsel for the defendant/petitioner submitted that against the appellate order/decree dated 28.4.1989 and against decree dated 4.10.1983, the petitioner also preferred second appeal but that was dismissed by this Court and its restoration petition is pending before this Court.

The objection against execution of the decree dated 4.10.1983 raised by the petitioner/judgment debtor was dismissed by the executing court by order dated 27.9.2003. Hence, this revision petition.

According to learned counsel for the petitioner, some facts are required to be taken note of which clearly indicates that the appeal was withdrawn because of the compromise and in the light of the compromise, the decree holder cannot execute the decree. The relevant facts are that the suit was decreed as back as on 4.10.1983 and the

appellate court decided the appeal on 28.4.1989. It is clear from the order-sheet dated 28.4.1989 that the appellant submitted an application narrating all the facts because of which the appellant/judgment debtor withdrew the appeal against eviction decree dated 4.10.1983. In the application, the petitioner/judgment debtor clearly mentioned that plaintiff Krishna Devi agreed that whatever her husband will decide, shall be binding upon her and even upon her heirs. The petitioner/defendant/judgment debtor also submitted that plaintiff Smt. Krishna Devi executed one power of attorney in favour of her husband who executed the agreement dated 25.4.1989 in favour of the defendant/judgment debtor. The petitioner also placed on record a copy of the agreement/partition dated 25.4.1989.

Thereafter, the plaintiff sold the property to the present respondents/ executors of the decree. Therefore, the decree holder who herself did not execute the decree for a long period of ten years, sold the property and the purchasers are executing the decree in violation of the settlement between the parties. It is submitted that the court below committed serious error of law in observing that any agreement executed by the petitioner/defendant with plaintiff's husband is not binding upon the plaintiff and further committed serious error of law in holding that simply the appellate court in its order dated 28.4.1989 while dismissing the appeal as not pressed, has mentioned that the judgment and decree of the trial court is maintained. Decree of the trial court is binding upon the judgment debtor and is executable. According to learned

counsel for the petitioner/judgment debtor, the appellate court should not have mentioned so because of the reason that the appellate court itself recorded the facts mentioned in the agreement between the plaintiff's husband and the petitioner in its order dated 28.4.1989.

I have considered the submissions of learned counsel for the petitioner and perused the record also.

It is clear from the facts mentioned above that the plaintiff filed the suit on the basis of her title and that was decreed by the trial court on 4.10.1983. The said decree was challenged by the petitioner/judgment debtor by preferring the appeal. The petitioner took the plea of the property being ancestral or joint family property but could not succeed in the court below and thereafter, it is alleged that the matter was settled between the plaintiff thorugh her husband and the petitioner/judgment debtor. The deed dated 25.4.1989 provides for distribution of the properties between the plaintiff's husband and the petitioner – plaintiff's husband's brother. The deed has been described as agreement – partition. The deed contains a condition that till one house is constructed by the plaintiff's husband and is given to the petitioner, the petitioner need not to vacate the house of plaintiff Smt. Krishna Devi. The said deed is unregistered document and if it is agreement, then the said agreement was not enforced by the defendant/petitioner for a long period for the reasons best known to the petitioner. It appears from the record that there were exchange of notices between the

plaintiff's husband and the defendant in the year 1994 and thereafter, in the year 1994, a suit for mere injunction was filed by the petitioner against the husband of the plaintiff, certified copy of which is placed on record of the execution petition. It appears that said suit for injunction too was got dismissed by the petitioner by moving an application seeking permission to withdraw the suit with liberty to file fresh suit by moving application on 6.9.1993. That fact as well as decision in that suit of the petitioner is not very much relevant except to take on record the fact that the suit was filed by the defendant against the plaintiff's husband but he did not file any suit for partition of the properties or for getting declaration about the properties may on the basis of the agreement dated 25.4.1989. Be it as it may be. Even in terms of the agreement, it appears that plaintiff Smt. Krishna Devi's right over the subject matter of the original suit no.17/1974 has been admitted by the petitioner and the petitioner/judgment debtor wants to resist the decree for possession only on the ground that the plaintiff's husband has not complied with the terms and conditions of the agreement dated 25.4.1989 and the said agreement was also on behalf of the decree holder – plaintiff. Under the agreement, the petitioner also had a right to enforce the term of the agreement against the plaintiff's husband if it could have been enforced in accordance with law but no action was taken by the petitioner even after so many years. Therefore, firstly, the judgment and decree of the appellate court is the

decree upholding the decree of the trial court for possession in favour of the plaintiff, therefore, it can be executed. Secondly, the alleged compromise is not with the plaintiff nor the agreement dated 25.4.1989 contains any recital that the plaintiff's husband has executed the agreement on behalf of the plaintiff or he is power of attorney of the plaintiff or the agreement has been executed was Karta Khandan of the family. And further, according to the defendant/judgment debtor, the plaintiff gave power of attorney to her husband but that also is not filed by the defendant.

Even if there was agreement to not to execute the decree by the plaintiff through her husband on 25.4.1989, then the said agreement could have been made basis for modification of the decree or passing the decree in terms of the compromise but that has not been done. If the defendant/petitioner had any right under the agreement of getting something in lieu of his doing or complying with the decree, then at the most, he could have claimed said relief by appropriate legal proceedings. The execution petition has been filed by the purchasers of the property in dispute in the year 1999 after about 10 years from the dismissal of the first appeal of the petitioner/ judgment debtor, therefore, the petitioner at such belated stage cannot resist the decree and enforce the agreement against the purchasers of the property or decree holder merely on the ground that in terms of the agreement, the decree holder should have discharged his duties under the agreement for getting the properties. In the facts of this

case, at this belated stage, such objection cannot be allowed particularly in view of the fact that plaintiff Smt. Krishna Devi was owner of the property and her right to take possession has been accepted by the judgment debtor even in compromise though on condition of providing alternative accommodation by plaintiff's husband.

In view of the above, the objection raised by the judgment debtor/petitioner against the execution are totally devoid of any force.

If the petitioner thinks that he has been cheated by his own brother Dr. Mahaveer Prasad (plaintiff's husband) by getting the appeal preferred by him against the judgment and decree passed in Smt. Krishna Devi's suit dismissed, then if the petitioner can take any action against the plaintiff's husband and if can take benefit of the agreement dated 25.4.1989, he is free to take action but only in accordance with law.

In view of the above discussion, I do not find any merit in the revision petition and the same is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya